Supreme Court, U.S.
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NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1997 TERM

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GREG D. BIAGI and LISA BIAGI,

Petitioners,

v.

UNITED STATES FOREST SERVICE,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where the Forest Service, a federal agency, has announced a decision to open to public vehicle use a road within the National Forest that has been closed to the public for at least 15 years, did the Forest Service properly refuse to perform an environmental assessment or take any other action to comply with NEPA in connection with its decision?

2. Where the Forest Service announced its decision to reopen the road in the context of a decision denying an in-holder's application for the transfer of a prior in-holder's permit to use the closed road, did the Court of Appeals properly conclude that no federal action occurred within the meaning of NEPA?

3. Does the term "major federal action" as used in NEPA have a meaning independent of whether or not an action has potentially significant environmental effects on the human environment, so that the District Court may properly conclude that the road reopening, is not subject to NEPA because it is not "major" in scope even though it may have significant effects on the environment?

4. Is the determination of the Forest Service that NEPA does not apply to its action in reopening a road within the National Forest which has been closed for 15 years appropriately reviewed under the "arbitrary and capricious" standard of review or under the "reasonableness" standard of review?

## LISTING OF PARTIES

The parties to this case are: (1) Greg D. Biagi, an individual; (2) Lisa Biagi, an individual; and (3) the United States Forest Service, an agency of the United States Government.

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Platts, Megahan & Marshall, *Methods for Evaluating Stream, Riparian, and Biotic Conditions*, at 16, 20, 21 (U. S. Dept. of Agric. Gen. Tech. Report INT-138, May 1983) . . . . . 4

## CITATION OF AUTHORITIES BELOW

The decisions of the courts below and administrative agencies previously entered in this case are not published.

## JURISDICTIONAL STATEMENT

This is a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. The decision below was filed on March 31, 1998. No petition for rehearing was filed in the Court of Appeals. This petition is timely pursuant to Supreme Court Rule 13.1.

Certiorari jurisdiction lies in this Court pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

This case involves the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq. This case further involves several regulations which have been adopted by the Council on Environmental Quality pursuant to express statutory authorization. These regulations include:

40 C.F.R. § 1501.4 (1998)

40 C.F.R. § 1508.18 (1998)

40 C.F.R. § 1508.27 (1998)

These statutory provisions and regulations are reproduced in the appendix to this Petition.

## STATEMENT OF THE CASE

Petitioners Greg and Lisa Biagi ("petitioners") challenge the refusal of respondent United States Forest Service ("Forest Service") to comply with NEPA's requirements in connection with its decision to open to public vehicle use a one-mile segment of unpaved road (hereinafter designated as the "Welch Creek road segment") within the Mendocino National Forest near Soda Creek, Welch Creek and Panther Creek, which are tributaries of the Eel River in California. This road is situated behind a gate which has been in place since at least 1981. The gate (hereinafter designated the "Soda Creek Gate") has the purpose and effect of protecting from heavy vehicle traffic an area that is critical to the Eel River watershed and highly sensitive to disturbance. ER Tab 45. The closed segment of road remains open to public use in the form of hiking, bicycling, or horseback riding. ER Tab 12, at 2.

The Welch Creek road segment is adjacent to Soda Creek. ER Tab 33, at 79; ER Tab 6. It is situated atop a steep embankment leading down to the creekbed. ER Tab 10, at 2; ER Tab 6 (photo). The road crosses Welch Creek at a point approximately 100 feet from the point where Welch Creek joins Panther Creek to form Soda Creek. ER Tab 33, at 79; ER Tab 10, at 2; ER Tab 7 (photo). The creek crossing is a simple ford. ER Tabs 6 (photo), 7 (photo). Normally a vehicle must submerge to a depth of four to six inches in order to cross Welch Creek at the ford. ER Tab 10, at 2. The water at the crossing is much deeper during the heavy rains of winter and spring. ER Tab 3, at 3.

After crossing Welch Creek, the Welch Creek road continues in a northwesterly direction and gains elevation as it approaches Faraway Ranch, which is an in-holding (a parcel of land surrounded by national forest). ER Tab 33, at 79. The Welch Creek road provides the only means of vehicle access to this in-holding. ER Tab 3, at 3. Near the boundary of Faraway Ranch, the road passes through a seasonal wetland. ER Tab 10, at 3. The road ends at Faraway Ranch. ER Tab 3, at 3.

In 1981, the Soda Creek gate was erected to block the Welch Creek road segment from public vehicle access. The gate was erected at the request of Floyd Elliott, who was then owner of Faraway Ranch. However, the closing of the road by the erection of the Soda Creek gate on National Forest land was specified in a written "position statement" of the Forest Service. ER Tab 2, at 4-5; ER Tab 33, at 65-69.

The permit allowing the Elliott in-holder to use the closed road provided that:

> This permit is not transferrable. Use of the road authorized by this permit shall be restricted to the present owners of the property served by the road and shall be used for the purpose of access to Faraway Ranch. If ownership of the property is changed by subdivision sale, transfer, foreclosure, or any other means, this permit will be terminated. If the use of the property served is changed in a manner that will affect the use of the road, the permit may be terminated. Before a new permit can be considered, a complete study will be needed of the effects that such a

> change in ownership and/or use will have on the National Forest land and its environment and management.

ER Tab 33, at 67.

In 1989 petitioners purchased Faraway Ranch. On July 28, 1990, petitioner Greg Biagi submitted an application to the Forest Service to obtain a special use permit for the closed Welch Creek road. ER Tab 33, at 60. The application was acknowledged in a letter from Forest Service District Ranger Easter, dated September 17, 1990. This letter stated in substance that the application appeared to be in order and that Easter expected the permit to be issued. The letter specifically authorized the continued maintenance of the Soda Creek gate as well as petitioners' use of the closed segment of the road to the west of the gate. ER Tab 33, at 58-59.

In May of 1995, the Forest Service issued a 184-page Watershed Analysis for the Upper Main Eel Watershed (hereinafter, "Watershed Analysis"). ER Tab 12, at 4; ER Tab 15. The Watershed Analysis documents the ecological importance of unpaved roads and road-related activities in the vicinity of the Welch Creek road segment.

The Watershed Analysis stressed the importance of Soda Creek and its tributaries, Welch and Panther Creeks, as one of the few remaining habitats in the entire watershed for

spawning salmon and steelhead.[1] ER Tabs 16, 17. The Forest Service has also recognized the importance of these streams by conducting a series of major riparian improvement projects aimed at restoring viable spawning habitat in the immediate vicinity of the Welch Creek road. ER Tabs 25, 26, 27.

This channel reconstruction project in Soda Creek "might be more successful in the long term," according to the Watershed Analysis, "if it were combined with upstream bedload reduction projects . . . and road relocation to help provide long-term stabilization." ET Tab 17; *see also* ER Tab 45, at 16.

The Watershed Analysis pointed out that salmon and steelhead spawning have been severely and adversely impacted by past road related activities in the vicinity of the creek, which have caused erosion.[2] ER Tabs 16, 17, 20, 21. The Watershed Analysis recommended projects to "minimize elevated sedimentation and erosion" as being

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[1]Coho salmon has been listed as a threatened species in an area that includes the Eel River and its tributaries. Steelhead is currently proposed for listing as a threatened and/or endangered species in the area, as well. ER Tab 45, at 18.

[2]Erosion and sedimentation are harmful to anadromous fish because they tend to destroy gravel deposits where the fish deposit their eggs. Sediment also interferes with the flow of oxygen and the elimination of metabolic wastes in spawning areas. Also, large-scale sediment deposition tends to destroy undercut banks, deep pools, and other cover areas which are important in the life cycle of anadromous salmonids. ER Tab 10, at 4-5; *see generally* Platts, Megahan & Marshall, *Methods for Evaluating Stream, Riparian, and Biotic Conditions*, at 16, 20, 21 (U. S. Dept. of Agric. Gen. Tech. Report INT-138, May 1983).

"immediately and directly beneficial to the anadromous fish," especially in tributaries such as Soda Creek. ER Tab 17. The specific type of project recommended is to "modify roads on the Forest and on private land" in order to reduce erosion associated with those roads. *Id.*

The Watershed Analysis concludes:

> [T]he forest cannot afford to have roads that are not part of a well-thought out transportation plan. Roads that are part of the transportation plan should be examined and reconstructed if necessary. Any roads not part of the transportation plan should be decommissioned.

ER Tab 21; *see also* ER Tabs 19, 20, 22; ER Tab 45, at 17. In particular, the Watershed Analysis recommends planning related to roads which should consider the following: locations of elevated sedimentation, erosion, and peak flows, including active or dormant slides; number of stream crossings; number and condition of culverts; location related to the streams; potential impacts on wildlife resources; presence of multiple roads providing access to the same areas; and presence of short spur roads that may not be necessary. ER Tab 45, at 17.

In late 1995 or 1996, for reasons unexplained in the record, the Forest Service apparently decided that the Welch Creek road should be reopened. See ER Tab 33, at 9-11, 12-13, 32; *see also* ER Tab 38, at 1-3. In announcing this decision, the Forest Service did not address any of the planning considerations listed in the Watershed Analysis. Nor did it attempt to reconcile the contradiction between the policies and recommendations set forth in the Watershed Analysis and its decision to reopen the road.

On February 9, 1996, the Forest Service disclosed to U. S. Representative Frank Riggs its intention to remove the Soda Creek gate, thereby opening the Welch Creek road segment to public vehicle use. ER Tab 33, at 12. This was the Forest Service's initial announcement of a decision to reopen the road. The same intention was later disclosed in a letter from the Forest Service to petitioners dated March 7, 1996. *Id.*, at 12. The March 7 letter explained the decision as follows:

> A review of the current situation indicates no resource or legal justification to retain the gate in its current location. The existing gate should be removed and relocated on private land at the property boundary between private and National Forest land.

ER Tab 33, at 10; see also *id.*, at 12.

On May 10, 1996 petitioners, through their attorney, submitted a letter to the Forest Service in which they requested the Forest Service to comply with its legal obligations under NEPA before taking any action to remove

the Soda Creek gate. ER Tab 33, at 2. The letter referred the Forest Service to statutes, regulations, and case law which require an environmental assessment ("EA") regarding this action. *Id.* Further, the letter pointed out numerous reasons why the opening of the particular road segment involved is significant enough, in terms of its potential environmental effects, to require a full environmental impact statement ("EIS"). *Id.*, at 3-5.

The same day, the Forest Service responded with its own letter reiterating its intention to remove the Soda Creek gate. ER Tab 22, at 1. The Forest Service's letter did not respond to petitioners' request for the Forest Service to comply with NEPA in connection with the decision to reopen the Welch Creek road segment. *Id.*

On June 10, 1996, petitioners filed this action for declaratory and injunctive relief in the U. S. District Court for the Northern District of California. ER Tab 1. In their complaint, petitioners requested the court to determine that the Forest Service's decision to reopen the Welch Creek road segment to public vehicle traffic without any form of environmental assessment violates NEPA. ER Tab 1, at 14. Petitioners requested the court to enjoin the Forest Service from removing the gate and opening the road until it has complied with NEPA. *Id.*, at 16.

Jurisdiction was vested in the District Court under two federal statutes, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 et seq. The District Court properly exercised subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331

(federal question), 2201 (declaratory relief), and 2202 (injunctive relief), and the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq.

The District Court agreed with petitioners that the reopening of the Welch Creek road is a federal action. In its memorandum decision of August 14, 1996, the District Court concluded petitioners had shown a substantial likelihood of success on their claim that the opening of the road is subject to NEPA. ER Tab 31. The District Court granted a preliminary injunction against the reopening of the road.

Cross-motions for summary judgment were heard on June 5, 1997. ER Tabs 42, 43, 46. On August 25, 1997, the District Court filed its second memorandum decision and order, granting the Forest Service's motion for summary judgment and denying that of petitioners. The court concluded that because the Welch Creek road segment is "only a one-mile segment of road," and because petitioners use the road segment to gain access to their neighboring land, the opening of the road to public vehicles "cannot, as a matter of law, constitute the type of 'major federal action' contemplated by NEPA." ER Tab 47, at 9-10 (emphasis in original).

Petitioners filed their a notice of appeal on September 2, 1997 and, at the same time, filed a motion for a temporary injunction to keep the Welch Creek road segment closed pending appeal. ER Tabs 49, 50. This motion was heard on October 9, 1997. ER Tab 51. The District Court, agreeing with petitioners that the legal issue involved here is substantial and that there is a dearth of governing case authority, granted petitioners' motion for an injunction

pending appeal. ER Tabs 51, 52.

Thus the Welch Creek road segment remains closed to public vehicles, pursuant to the District Court's order, at this time.

On March 31, 1998, the Court of Appeals filed its decision in this matter. The decision, in its entirety, states:

> No federal action occurred here to trigger the requirements of the National Environmental Policy Act (NEPA). Neither the expiration of the permit, nor the denial of the application for a new permit, nor the removal of the unpermitted gate constitutes "major Federal action [] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2) (c). NEPA regulations expressly exclude "civil or criminal enforcement actions." 40 C.F.R. § 1508.18 (a).

Petitioners now request this Court to issue its writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## ARGUMENT

### A. This Court Should Grant Review in Order to Determine the Proper Approach to Identifying Agency "Action" Subject to Review Under NEPA

The Court should grant certiorari in this case to resolve a fundamental and recurring issue. When the Forest Service decides to reopen an unpaved road segment in an environmentally sensitive area that has been closed for a substantial period of time, does "federal action" occur which is subject to review under NEPA? This would seem to be exactly the sort of discretionary decision by a federal agency for which NEPA requires consideration of environmental effects. *Andrus* v. *Sierra Club*, 442 U.S. 347, 360 (1979) ("the 'action-forcing' provisions of NEPA are directed precisely at the processes of 'planning and decisionmaking'"); *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976) (NEPA's requirement that NEPA be implemented "to the fullest extent possible" represents a deliberate command to agencies to consider environmental factors rather than shunting them aside in bureaucratic shuffle).

However, the Court of Appeals ruled that in this situation, no "federal action" occurred. This conflicts with the governing CEQ regulation as well as prior authority from this Court. It also demonstrates confusion regarding the proper scope and application of NEPA which this Court should resolve at this time.

The Forest Service concedes that a decision to close the Welch Creek road segment, in response to a permit

application or otherwise, would constitute a federal action that requires environmental assessment under NEPA. ER Tab 28, at 9 & n.2; ER Tab 42, at 4; ER Tab 44, at 21-22. Moreover, several cases have held that a federal agency's decision to reopen a closed road is action subject to review under NEPA. *E.g.*, *Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (Forest Service's issuance of special use permit to a private party to reopen and use a closed road within the National Forest constitutes a major federal action within the meaning of NEPA); *Puerto Rico Conservation Foundation* v. *Larson*, 797 F.Supp. 1066, 1070 (D. P.R. 1992) (decision of Fed. Highway Administration and Forest Service to rebuild portion of road running through rain forest constitutes a major federal action within the meaning of NEPA); *see also Sierra Club* v. *Hodel*, 848 F.2d 1068, 1090-91 (10th Cir. 1988) (major federal action was present where BLM had regulatory authority over change in course of roadbed, and had duty to prevent unnecessary degradation of environment arising from changes in rights-of-way).

However, the Forest Service takes the position here that because the reopening of the Welch Creek road segment is related to the "expiration" of a permit, coupled with the decision to deny a "new" permit,[3] NEPA does not apply.

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[3]Petitioners disagree with this characterization of the Forest Service's decision. The record indicates that the Forest Service has, sub silentio, reclassified the Welch Creek road segment from one that was stated to be in "Level 1" or "nonuse" status in 1990, see ER Tab 33, at 58, to one that is now in "Level 2" status meaning that it is available for use by "high clearance vehicles." The decision to reclassify the road should have been subject to environmental review at some point under NEPA.

The Court of Appeals accepted this position as the sole basis of its holding that "no federal action occurred here" to trigger the requirements of NEPA. This elevates a semantic distinction over the actual substance of the Forest Service's decision, which is to reopen a road that was closed for fifteen years by reason of a previous management decision of the Forest Service.

Thus, the question squarely presented for review by the Court in this case is whether or not the applicability of NEPA should turn on the formal character of the agency's decision (e.g., "permit denial" versus "permit approval") as opposed to the substantive effect of the agency's decision.[4]

CEQ regulations under NEPA[5] support petitioners' view that the substance of the agency's decision, rather than the mere form of the decision, should properly determine whether or not agency "action" has occurred. In particular,

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[4]Lower federal courts have struggled with the agency "action versus inaction" issue. *Compare Sierra Club* v. *Hodel*, 848 F.2d 1068, 1090-91 (10th Cir. 1988) (agency's failure to act in connection with road project held to trigger NEPA review); *Bunch* v. *Hodel*, 642 F.Supp. 363, 365 (W.D. Tenn. 1985) (federal agency inaction in connection with a state water project triggers review under NEPA) *with Defenders of Wildlife* v. *Andrus*, 627 F.2d 1238, 1240, 1245-47 (D.C. Cir. 1980) (Secretary of Interior's failure to act in connection with wolf kill on public lands held not subject to review under NEPA); *State of Alaska* v. *Andrus*, 591 F.2d 537, 538-39 (9th Cir. 1979) (same); *Minnesota Pesticide Information & Education, Inc.* v. *Madigan*, 857 F.Supp. 653, 654 (D. Minn. 1993) (Forest Service decision to discontinue the use of herbicides held to constitute "inaction" not subject to review under NEPA).

[5]In *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), the Court held that CEQ's interpretation of NEPA is entitled to substantial deference.

40 C.F.R. § 1508.18 provides that

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

The regulation also provides that federal actions include "actions approved by permit." This Court should grant certiorari in order to resolve the evident uncertainty concerning whether or not "actions" under NEPA include permit decisions which, although phrased in the negative, have the effect of instituting a significant change in the status quo.

## B. The Court Should Grant Certiorari to Resolve Whether or Not an Agency Action Must Have a "Major" Scope, Independent of Its Possible Environmental Significance, in Order for NEPA to Apply

The District Court in this case rejected the argument that the Forest Service decision to reopen the Welch Creek road segment, because couched in terms of a permit "denial," is not federal action. However, the District Court concluded that NEPA does not apply here because the reopening of a "one-mile" segment of road is too small in scope to constitute a "major federal action" under NEPA. Thus, the District Court held that NEPA prescribes a dual standard under which an agency's action must be **both** "major" in scope **and** have the potential to affect the environment "significantly" before review is required under NEPA. ER Tab 47, at 7 (reproduced in appendix to this Petition).

The Forest Service's own 1995 Upper Eel River Watershed Analysis stresses the particular importance of planning in connection with roads and road-related activities. These activities have been major historical causes of erosion which has severely harmed anadromous fisheries. This Forest Service document, as supplemented by expert testimony in the record, highlights with unusual clarity the distinction between the "scope" of the agency's action and whether or not it affects the environment "significantly." The kinds of effects threatened by the Welch Creek road reopening are what the applicable CEQ regulation defines as "significant" both in terms of "context" and "intensity." *See* 40 C.F.R. § 1508.27 (1998) (reproduced in appendix).

The District Court decision noted that the federal courts are divided with respect to whether NEPA imposes a dual standard requiring an action to be both "major" and "significant" before environmental review is required. *Id.* The District Court further pointed out that few cases have expressly addressed this question. The District Court's order staying the road reopening pending appeal is a further acknowledgement of the unsettled nature of this issue.

The District Court's view that there exists a "dual standard" conflicts with the CEQ regulations under NEPA. According to 40 C.F.R. § 1508.18, the term "major" simply "reinforces but does not have a meaning independent of significantly." *Id.* However, courts and commentators continue to be confused with respect to whether or not an action must be in some sense "major" for NEPA to apply. *E.g.*, Mandelker, *NEPA Law & Litigation*, § 8.06, at 8-70 (1990).

The "dual standard" terminology apparently originated in a Third Circuit case, *NAACP* v. *Medical Center, Inc.*, 584 F.2d 619 (3d Cir. 1978). There, the court considered a situation in which a hospital care provider applied to the federal Department of Health, Education & Welfare ("HEW") for federal funds in connection with a planned consolidation of its operations. *Id.*, at 623. HEW concluded that even though the consolidation plan would have a significant impact on the quality of the human environment, HEW was not required to prepare an EIS because its approval of the funding request did not transform the private project into a "major federal action" within the meaning of NEPA. *Id.*, at 625. The court of appeals upheld HEW's interpretation of the law on this point. *Id.*, at 626.

As originally used in this analysis, the term "major" is used to distinguish a genuinely federal action from a "marginally" federal action. It pertains only to the degree of federal agency involvement in the challenged action, and has nothing at all to do with the "scope" of the action. *See, e.g.*, *Sugarloaf Citizens Association* v. *FERC*, 959 F.2d 508, 512-13 (4th Cir. 1992) (where FERC's approval of incinerator facility was a ministerial act, and agency did not have discretion to deny certification to any facility meeting enumerated criteria, construction of the incinerator by private parties was not a "major federal action"); *Goos* v. *ICC*, 911 F.2d 1283 (8th Cir. 1990) (ICC issued Notice of Interim Trail Use not a major federal action because agency had no discretion to refuse to issue notice if statutory requirements were met); *Ringsred* v. *City of Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987) (Secretary of Interior's actions relating to a parking ramp to be constructed by private parties, and which did not require federal approval or assistance, were so incidental that project "does not constitute part of a major federal action").

The District Court's expansive reading demonstrates the need for clarification of this important aspect of NEPA. This Court should grant certiorari in order to clarify how NEPA's key phrase "major federal action" should be understood and applied.

### C. Certiorari Should Be Granted to Resolve a Conflict in the Circuits Regarding the Standard of Review of Agency Determinations Concerning the Threshold Applicability of NEPA

In this case, the Forest Service refused to follow NEPA's requirements because it determined that NEPA did not apply at all to its decision to reopen the Welch Creek road segment. Thus, one issue which is presented here is what standard should properly govern the District Court's review of the agency's threshold determination that NEPA is inapplicable.

There is a split in the circuits regarding this question. The Eleventh Circuit, viewing the issue as one controlled by the holding of this Court in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), has adopted the "arbitrary and capricious" standard of review. *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990). On the other hand, the Eighth, Ninth, and Tenth Circuits have held that the analysis of *Marsh* is inapplicable and the agency determination is to be sustained only if it is "reasonable." *Northcoast Environmental Center* v. *Glickman*, 136 F.3d 660, ___, 1998 U.S.App. LEXIS 2204, at *16-17 (9th Cir. 1998); *Sierra Club* v. *Lujan*, 949 F.2d 362, 367 (10th Cir. 1991); *Goos* v. *ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990).

The Court should grant certiorari in order to resolve this conflict as to the proper standard of review.

## CONCLUSION

Earlier this term in *Ohio Forestry Ass'n* v. *Sierra Club*, ___ U.S. ___, 66 U.S.L.W. 4376, 1998 U.S. LEXIS 3101 (filed May 18, 1998), the Court narrowed the scope of NEPA scrutiny of the Forest Service's land and resource management program by holding that an abstract plan which does not "command anyone to do anything or to refrain from doing anything" is not ripe for judicial review. 1998 U.S. LEXIS 3101 at *14. The Court's unanimous opinion instead placed the focus of judicial review under NEPA on specific decisions which threaten "practical harm" to environmental interests. *Id.*

The Court shied away from federal court adjudication of "abstract disagreements over administrative policies." *Id.*, at *19-20. Instead, the Court deferred judicial review until such time as the environmental consequences are "reduced to more manageable proportions" because the "factual components were fleshed out, by some concrete action." *Id.*, at *20.

The current case presents the reverse situation. In view of the Forest Service's decision to reopen the Welch Creek road, as well as the Watershed Analysis which convincingly demonstrates the potential environmental significance of the road reopening, there can be no question that "concrete action" is impending. *Ohio Forestry*, in fact, points out that the harms associated with the "allowing of motorcycles into a bird-watching area" would represent the paradigm of a situation which is subject to review under NEPA. *Id.*, at *23-24.

The facts of this case approach the paradigm of concrete action identified in *Ohio Forestry*. Yet the lower court decisions in this case have resulted in a paradoxical avoidance of any procedure for the agency review of environmental consequences, and consideration of alternatives. Congress intended such a procedure to be guaranteed under NEPA. *See Ohio Forestry*, 1998 U.S. LEXIS 3101, at *20.

The Court should grant certiorari in this case in order to clarify how and when an agency should conduct its NEPA review in connection with a decision having significant environmental consequences, such as the decision to reopen the Welch Creek road segment.

Dated: May 27, 1998.

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## APPENDIX A: OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW SOUGHT TO BE REVIEWED

*DECISION OF THE UNITED STATES DISTRICT COURT, FILED AUGUST 25, 1997 [ER TAB 47]*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| GREG D. BIAGI and LISA BIAGI,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>UNITED STATES FOREST SERVICE, an agency of the United States,<br><br>Defendant-Appellee. | No. 97-16728<br><br>DC# CV 96-2129 WHO<br>Northern California<br><br>**M E M O R A N D U M DECISION AND ORDER** |

In this action for declaratory and injunctive relief, plaintiffs Greg D. Biagi and Lisa Biagi sue defendant United States Forest Service ("Forest Service") for its failure to comply with the requirements of the National Environmental Policy Act ("NEPA"). 42 U.S.C. § 4321 et seq. (1994 & Supp. 1997). Plaintiffs have moved to augment the administrative record, and the parties have filed cross-motions for summary judgment. For the reasons set forth hereinafter, the Court grants defendant's

motion for summary judgment, denies plaintiffs' motion for summary judgment, grants plaintiffs' motion to augment the record to analyze the motions, and dissolves the preliminary injunction currently in effect.

I.

At issue in this action is the Soda Creek Gate that blocks vehicular access to a one-mile segment of unpaved road, known variously as Forest Service Road 20N01E, the Faraway Ranch Road, and the Welch Creek Road (collectively "Welch Creek Road"), in the Mendocino National Forest. Plaintiffs own Faraway Ranch, which is at the end of the road in question and is a parcel of private land surrounded by the Mendocino National Forest.

On August 26, 1981, Floyd Elliott ("Elliott") then-owner of Faraway Ranch, submitted an application for a permit to allow him to use a segment of Welch Creek Road, and to install a gate across the road on national forest land approximately 1.3 miles from the border of his property. A special use permit, for a one-mile segment of road, was issued to Elliott in January 1982. The permit expressly stated that it was not transferable, and would expire on December 31, 1992, unless sooner terminated or revoked.

In 1989, plaintiffs purchased Faraway Ranch. On July 28, 1990, plaintiffs submitted an application for a special use permit for the continued use of Welch Creek Road and Soda Creek Gate. On September 17, 1990, District Ranger Gilbert H. Easter, Jr. ("Easter") acknowledged receipt of the application, stating he expected the permit to be issued. Easter also told plaintiffs that his

letter would provide them with the necessary authorization to maintain the gate and use the road behind it.

No permit ever was issued to plaintiffs. By memo dated January 15, 1992, F. Dale Robertson, Chief of the Forest Service, notified all Regional Foresters that the practice of providing letters of authorization permitting occupancy of national forest lands was to be discontinued immediately. On March 7, 1996, Carl W. Tompkins ("Tompkins"), Acting Director, Lands and Real Estate Management, Pacific Southwest Region, Forest Service, sent a letter to plaintiffs, stating that there was no legal authorization for the gate's placement on national forest land, and that it should be removed and relocated to the boundary of plaintiff's property. On March 26, 1996, District Ranger Blaine Baker ("Baker") notified plaintiffs that they had ninety days from receipt of the March 7 letter from Tompkins to remove the gate from national forest land. Baker also indicated that plaintiffs could submit a proposal relating to a road use permit.

On May 10, plaintiff's counsel, Robert Riggs, sent a letter to Daniel Chisholm, Forest Supervisor of the Mendocino National Forest, requesting that the Forest Service comply with its obligations under NEPA before removing the gate, and pointing out numerous environmental issues. The Forest Service did not agree to do anything with respect to NEPA compliance.

Specifically, plaintiffs seek to enjoin the Forest Service from removing the gate and opening Welch Creek Road to public access, and to compel the Forest Service to perform the required environmental assessment in connection

therewith.

II.

Preliminarily it should be noted that plaintiffs have brought suit under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (1996),[1] pursuant to which final agency actions are subject to judicial review. APA § 10, 5 U.S.C. § 702. There is no dispute that defendant's decision not to grant plaintiffs' permit request constitutes final agency action for purposes of the APA.

As a general rule, when reviewing agency decisionmaking pursuant to the APA, courts are limited to the administrative record that formed the basis for the agency decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 401, 420 (1971). In NEPA cases, however, "a primary function of the court is to insure that the information available to the decisionmaker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored." Animal Defense Council v. Hodel, 840 F.2d 1432, 1437 (9th Cir. 1988) (citations and internal quotation marks omitted).

Because one of the principal issues for decision in these cross-motions for summary judgment is the applicability of NEPA to this case, the Court has assumed

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[1]NEPA does not create a private right of action. Oregon Natural Resources Council, Inc. v. Bureau of Reclamation, 37 F.3d 1414, 1415 (9th Cir. 1994).

for purposes of its analysis that the administrative record may be augmented to include the declarations filed with these motions, and grants plaintiffs' motion to augment the record.

The major issues raised by the cross-motions for summary judgment (in addition to the augmentation of the record) are whether (1) plaintiffs have standing, (2) the decision not to grant plaintiffs a new permit constitutes a "major federal action within the meaning of the statute, and (3) if so, such action significantly affects the human environment, thus requiring the preparation of an environmental impact statement ("EIS"). The Court deals with each of these issues seriatim.

A.

Plaintiffs have standing to seek judicial review of agency section under § 10 of APA if they allege that federal action has caused the "injury in fact," and that the injury is to an interest falling within the "zone of interests" regulated by the NEPA provision purportedly violated. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Cady v. Morton, 527 F.2d 786, 791 (9th Cir. 1975). Plaintiffs who assert purely economic injury do not have standing under NEPA to challenge agency action. Western Radio Servs. Co. v. Espy, 79 F.3d 896, 902-3 (9th Cir. 1996).

Defendant argues that plaintiffs have failed to establish the elements of standing, maintaining that plaintiffs' motive in bringing suit is purely economic, namely, a desire to protect the value of their property.

Defendant submits numerous declarations purporting

to show that plaintiffs (1) committed violations of the California Fish and Game Code, (2) are out of compliance with a permit to divert 253 acre-feet of water out of Welch Creek to supply a pond on their property, national forest land, and (4) have treated national forest land as if it were their own, putting up "No Trespassing" and "Private Property" signs.

Defendant's proposition that motive is the key to determining prudential standing under NEPA finds no support in the case law. Defendant's factual allegation, thus, even if true, are irrelevant to the standing issue. They neither controvert plaintiffs' declarations asserting environmental injury nor create a genuine dispute of material fact with respect to the nature of the injuries plaintiffs allege. Plaintiffs, therefore, have standing to pursue the litigation.

B.

Whether the decision not to grant plaintiff a new permit constitutes a "major federal action" within the meaning of NEPA requires and examination of the statute and its legislative history. In enacting NEPA, one of Congress's important goals was to declare a national policy of encouraging productive and enjoyable harmony between man and the environment, and promoting efforts to prevent or eliminate damage to the environment. 42 U.S.C. § 4321. NEPA provides that a detailed EIS shall be prepared for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. 4332 (2) (C), unless a properly prepared environmental assessment indicates that no EIS is necessary. Ramsey v. Kantor, 96 F.3d 434, 439 (9th Cir. 1996) (citing 40 C.F.R. §§ 1501.4 and 1508.9(a) (1)).

The purpose of an EIS is to provide full and fair discussion of significant environmental impacts and to inform decisionmakers and the public of reasonable alternatives that would minimize adverse impact to the environment. 40 C.F.R. § 1502.1 (1997).

"Major Federal action" is defined in relevant part as follows:

> [Includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. . . . Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act of other applicable law as agency action . . . . (b) Actions include . . . . (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18 (1997) (emphasis added). Defendant has stipulated that it did not comply with NEPA's procedural assessment before deciding not to issue plaintiffs a permit. Thus, the key issue in this case is whether NEPA applies.

NEPA's procedural requirements come into play only when "major Federal actions significantly affecting the quality of the human environment . . . ." are involved. 42

U.S.C. 4332 (2) (C). Once a court has determined that an agency has taken an action, and that it is federal, the next issue for decision is whether the action is "major" and whether it "significantly" affects the quality of the human environment. Mandelker § 8.06 at 8-70. Courts are divided with respect to

> whether [NEPA] imposes a dual standard requiring an action to be both major and significant, or whether it imposes a unitary standard under which an action is held to be a major action if it is significant. Only a few cases have explicitly considered this problem. In many decisions the court considers only one of these requirements, or assumes that both requirements must be met.

Id. Ninth Circuit case law adopts the dual standard. See e.g., Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 234 (9th Cir 1990); Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982).

Defendant maintains that no "major Federal action" has occurred in this case, and that the requirements of NEPA do not come into play. By its terms, the Elliott permit expired when the property was sold. Defendant has notified plaintiffs that it will not grant them a new permit, and that it wants the gate removed. Because the Elliott permit for the gate has expired, the gate is now illegally on federal land. Defendant contends it may be removed without implicating NEPA, because the decision to grant plaintiffs a new permit does not constitute federal action, but nonaction, and in any

case cannot be construed as "major."

This still leaves the question whether, even if defendant's failure to grant plaintiffs a special use permit constitutes federal action, such action can be construed as "major." Defendant argues, citing, inter alia, Sierra Club v. Penfold, 857 F.2d 1307, 1309, 1314 (9th Cir. 1988). and Molokai Homesteaders Cooperative Ass'n v. Morton, 506 F.2d 572, 580 (9th Cir. 1974), that it cannot.

Little case law exists defining the term "major" as used in the statute. One court has held that "major" actions are projects involving over a million dollars of federal funding, large amounts of planning and construction time, the displacement of "many people or animals, or the reshaping of large areas of topography." Mandelker § 8.06(3) at 8-73 (quoting Township of Ridley v. Blanchette, 421 F. Supp. 435 (E.D. Pa. 1976)).

Actions held to be major have included a sixty percent federally-financed, $14 million bridge and a sixty-six-mile water channel project that cost $1.5 million, $706,000 of which was federally-funded. Id. Actions held to be minor have included a replacement bridge, demolition of an historic building to which $25,000 of federal funding had been committed, the retrofitting of 20,000 railway cars to meet safety regulations, the transfer of a small group of employees and an agency function from an agency field office, and minor traffic improvements. Id. The majority of cases finding major federal action involve actions much broader in scope than those here. See e.g. Davis v. Morton, 469 F.2d 593 (10th Cir. 1972); Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986).

It is true, as plaintiffs assert, that in Wild Sheep the issuance of a permit to use a road was assumed to constitute a major federal action under NEPA.[2] 681 F.2d at 1177. Although the permit issuance in Wild Sheep was similar to the challenged action here in that it involved the reopening of a road, the permit issuance was broader-reaching in its potential effects than has ever been alleged in this case. Road 2NO6 had been used to haul gold ore from the San Gabriels in the 1930s. 681 F.2d at 1175. It traversed the upper reaches of several canyons. Id. The proposal at issue involved clearing the road of vegetation, widening it to twelve feet where necessary, and reconstructing washed-out areas so that it could be used as a haul road for mining trucks. Id. The concern of the environmentalists who opposed reopening the road was that Road 2NO6 passed directly through the area occupied (for lambing and rearing of young) by one of the few remaining herds of Desert Bighorn Sheep, a "sensitive" species entitled to special protection. Id. at 1175-76. The road also passed near a mineral lick used by the herd, which numbered 400 to 700 sheep. Id.

Welch Creek Road, which plaintiffs currently use on a regular basis, is only a one-mile segment of road in the Mendocino National Forest that leads only to Faraway Ranch. Despite the "important congressional mandate to have NEPA apply 'to the fullest extent possible,'" Jones, 792

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[2] The issue on appeal was not whether it was, or was not, major federal action. The issue was whether the Forest Service had been reasonable in its conclusion that the permit issuance "was not an action significantly affecting the quality of human environment," thus requiring preparation of an EIS. Wild Sheep, 681 F.2d at 1177.

F.2d at 826 (quoting 42 U.S.C. § 4332), and despite plaintiffs' allegations that reopening the road will lead to increased erosion and sedimentation in neighboring creeks, increased risk of roadbed failure due to slides and wildfires, deleterious effects on the northern spotted owl and goshawk populations and anadromous fisheries, sensitive reptiles, amphibians, and plants in the area, and increased morality of black-tailed deer from increased hunting and vehicle activity, the denial of a special use permit by defendant here cannot, as a matter of law, constitute the type of "major Federal action" contemplated by NEPA. Cf., e.g., Upper Snake River, 921 F.2d at 234 (Bureau of Reclamation's periodic adjustment of river flow constituted "ongoing operations" that did not have to comply with NEPA's EIS provision). To so rule would be to vest entitlements in private individuals occupying national forest land, and cripple defendant in its ability to manage the nation's forests.

C.

As the Court holds that defendant's refusal to issue a special use permit to plaintiffs does not constitute major federal action, the Court need not reach the issue whether such action constitutes major federal action significantly affecting the human environment, thus requiring the preparation of an EIS, because NEPA is not implicated.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment is GRANTED.

2. Plaintiffs' motion for summary judgment is DENIED.

3. Plaintiffs' motion to augment the record is GRANTED.

4. Plaintiffs' preliminary injunction is DISSOLVED.

Dated: August 25, 1997.

William H. Orrick
United States District Judge

*DECISION OF THE UNITED STATES COURT OF APPEALS, FILED MARCH 31, 1998*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GREG BIAGI and LISA BIAGI, | C.A. No. 97-16728 |
| Plaintiffs-Appellants, | DC# CV 96-2129 WHO |
| vs. | **MEMORANDUM** |
| UNITED STATES FOREST SERVICE, | |
| Defendant-Appellee. | |

Appeal from the United States District Court*
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and submitted March 12, 1998
San Francisco, California

Before:

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

SKOPIL and KOZINSKI, Circuit Judges, and WEINER, District Judge**

No federal action occurred here to trigger the requirements of the National Environmental Policy Act (NEPA). Neither the expiration of the permit, nor the denial of the application for a new permit, nor the removal of the unpermitted gate constitutes "major Federal action [] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2) (c). NEPA regulations expressly exclude "civil or criminal enforcement actions." 40 C.F.R. § 1508.18 (a).

AFFIRMED.

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** The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

## APPENDIX B: PERTINENT STATUTES AND REGULATIONS

### 42 U.S.C. § 4332 (1998):

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

. . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Council on Environmental Quality (CEQ) Regulations:

**§ 1501.4 Whether to prepare an environmental impact statement.**

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 15089). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

**§ 1508.18 Major Federal action.**

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). . . .
>
> (b) Federal actions tend to fall within one of the following categories:
>
> . . . .
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other

regulatory decision as well as federal and federally assisted activies.

**§ 1508.27 Significantly.**

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or

ecologically critical areas.

(4) The degree to which the possible effects on the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened speciies or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatnes a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

FILED
AUG 3 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1938

# In the Supreme Court of the United States

OCTOBER TERM, 1997

GREG D. BIAGI AND LISA BIAGI, PETITIONERS

*v.*

UNITED STATES FOREST SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Forest Service's refusal to allow petitioners to retain a gate on National Forest lands, which would prevent traffic on a National Forest System road from approaching within one mile of petitioners' property, is a federal "action" subject to the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1938

GREG D. BIAGI AND LISA BIAGI, PETITIONERS

*v.*

UNITED STATES FOREST SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. A13-A14) and the opinion of the district court (Pet. App. A1-A12) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 31, 1998. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Congress has charged the Forest Service, an agency within the United States Department of Agriculture (USDA), with managing the National Forest System, which consists of 191 million acres of

federally owned lands. See, *e.g.*, 16 U.S.C. 1604(e); 58 Fed. Reg. 19,369 (1993). In connection with those responsibilities, the Forest Service processes applications for special use authorizations (commonly known as special use permits), which "allow[] occupancy, use, rights, or privileges of National Forest System land." 36 C.F.R. 251.51.

With exceptions not relevant here, Forest Service regulations provide:

> All uses of National Forest System lands, improvements, and resources * * * are designated "special uses." Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization[.]

36 C.F.R. 251.50(a). The Forest Service may deny an application for a special use permit for a variety of reasons, including that "[t]he proposed use would be inconsistent or incompatible with the purpose(s) for which the lands are managed, or with other uses," or "would not be in the public interest." 36 C.F.R. 251.54(i)(1), (2). A special use authorization terminates "[w]hen, by its terms, a fixed or agreed upon condition, event, or time occurs," 36 C.F.R. 251.60(a)(2)(iv), or "at the discretion of the authorized officer for reasons in the public interest." 36 C.F.R. 251.60(b). Upon termination, the permittee is obligated to remove any improvements and to restore the site to the satisfaction of the Forest Service. 36 C.F.R. 251.60(j).

Forest Service regulations prohibit any person from: "Constructing, placing, or maintaining any kind of * * * structure, fence * * * or other improvement on National Forest System land * * *

without a special-use authorization," 36 C.F.R. 261.10(a); "[p]lacing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person," 36 C.F.R. 261.10(f); or "[b]locking, restricting, or otherwise interfering with the use of a road, trail, or gate," 36 C.F.R. 261.12(d). Violations of those regulations are punishable by fine or imprisonment. 36 C.F.R. 261.1b. Forest Service officers may impound personal property placed without authorization on National Forest System lands, 36 C.F.R. 262.12(a), and may remove an "object which is an impediment or hazard to the safety, convenience, or comfort of other users of an area of the National Forest System." 36 C.F.R. 262.13.

2. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (1994 & Supp. II 1996), is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Section 102(2)(C) requires "all agencies of the Federal Government" to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" (known as an environmental impact statement (EIS)) addressing, among other things, "the environmental impact of" and available "alternatives to" the proposed action. 42 U.S.C. 4332(2)(C) (1994 & Supp. II 1996). The Council on Environmental Quality (CEQ) has promulgated regulations to assist

agencies in implementing NEPA. 40 C.F.R. 1500 *et seq.* "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

3. Petitioners own a ranch located wholly within the boundaries of the Mendocino National Forest in northern California. The sole access road is Forest Service Road 20N01E, which winds through the National Forest for about two miles, past several public campsites, and terminates at petitioners' property line. See Pet. App. A2; Excerpts of Record (ER) Tab 33, at 69. Forest Service Road 20N01E itself, and all of the land through which it passes, are federal property under the administration of the Forest Service. *Ibid.*

In 1981, Floyd Elliott, the preceding owner of petitioners' ranch, obtained a special use permit authorizing him to install a gate across Forest Service Road 20N01E, at a point approximately one mile from his property line, for the purpose of barring public vehicular access (but not pedestrian and other forms of public access) to the one-mile segment of the Forest Service road. Pet. App. A2; ER Tab 33, at 65-73. The special use permit contained conditions providing that it would expire on December 31, 1992, unless revoked, at the discretion of the Forest Service, before that date. ER Tab 33, at 65-67. The permit was "not transfer[ ]able" and was to terminate "[i]f the ownership of the property is changed by subdivision[,] sale, transfer, foreclosure, or any other means." ER Tab 33, at 67.

In 1989, petitioner Greg Biagi purchased the ranch. ER Tab 3, at 3. In June 1990, the Forest Service informed Biagi that the special use permit issued to Elliott was "not transferable" and that he would need

to apply for a new special use permit to maintain the road segment and keep the gate in place. ER Tab 33, at 63. On July 28, 1990, Biagi submitted an application for a special use permit for the continued use of Forest Service Road 20N01E and retention of the gate. ER Tab 33, at 60-61.

On September 17, 1990, District Ranger Gilbert Easter sent petitioner Greg Biagi a letter acknowledging receipt of his special use permit application. ER Tab 33, at 58-59. In April 1994, District Ranger Blaine Baker informed Biagi that his application for a special use permit appeared to be complete. ER Tab 33, at 32. On December 27, 1995, Biagi wrote to Congressman Frank Riggs complaining about not yet having received a special use permit. ER Tab 33, at 19-21. In response to a resulting inquiry, the Chief of the Forest Service explained that it had been inappropriate for the agency ever to have permitted a gate "on national forest land over one mile from the property boundary," and that "[t]here is no reason or justification for retaining the gate in its current location." ER Tab 33, at 12.

On March 7, 1996, Carl Tompkins, Acting Director for Lands and Real Estate Management of the Forest Service's Pacific Southwest Region, informed Greg Biagi that there was "no resource or legal justification to retain the gate in the current location" and that "the existing gate should be removed and relocated on private land at the property boundary between private and National Forest land." ER Tab 33, at 10. Tompkins warned that the Forest Service would remove the gate after 90 days if Biagi did not remove it before then. *Ibid.* See also ER Tab 33, at 1, 7.

4. Petitioners filed this lawsuit on the eve of the Forest Service's 90-day deadline for removing the gate. They alleged that the imminent removal of the gate violated NEPA, CEQ regulations, and the Administrative Procedure Act (APA), 5 U.S.C. 706, because the agency had not prepared an environmental assessment (see 40 C.F.R. 1508.9) or an environmental impact statement. ER Tab 1, at 11-15. On August 14, 1996, the district court entered a preliminary injunction barring the Forest Service from removing the gate. ER Tab 31, at 14-15. On August 25, 1997, the district court dissolved the preliminary injunction and granted the Forest Service's motion for summary judgment. Pet. App. A1-A12.

The district court concluded that the Forest Service's "refusal to issue a special use permit to plaintiffs does not constitute major federal action." Pet. App. A11. It surveyed decisions identifying "major" federal action and observed that most of the cases involved "actions much broader in scope than" the Forest Service's decision here to remove a gate from a "*one-mile segment* of road" that plaintiffs themselves "currently use on a regular basis." *Id.* at A9, A10. The court held that "the denial of a special use permit by defendant here cannot, as a matter of law, constitute the type of 'major Federal action' contemplated by NEPA." *Id.* at A11. "To so rule," the court reasoned, "would be to vest entitlements in private individuals occupying national forest land, and cripple defendant in its ability to manage the nation's forests." *Ibid.* Because the district court concluded that the Forest Service's decision to deny a permit for the gate was not a "major" federal action—a conclusion sufficient to establish that "NEPA is not implicated"—the court did not reach the question

"whether such action constitutes major federal action significantly affecting the human environment." *Ibid.*

In a memorandum decision, the court of appeals affirmed. Pet. App. A13-A14. The court ruled that "[n]o federal action occurred here to trigger the requirements of [NEPA]." *Id.* at A14. The court explained that neither the expiration of the Elliott special use permit, nor the denial of petitioner's application for a special use permit, nor "the removal of the unpermitted gate," was subject to NEPA's requirements. *Ibid.* It also noted that "NEPA regulations expressly exclude 'civil or criminal enforcement actions.'" *Ibid.* (quoting 40 C.F.R. 1508.18(a)).

**ARGUMENT**

1. Petitioners contend (Pet. 10-13) that the court of appeals erred in failing to require the Forest Service to engage in a NEPA analysis before directing petitioners to remove an unauthorized gate from National Forest System lands. Petitioners are mistaken. As the court of appeals correctly explained, the Forest Service's demand that petitioners remove the unpermitted gate is not an "action" for purposes of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C) (1994 & Supp. II 1996). The court of appeals' decision does not conflict with any decision of this Court or another court of appeals.

NEPA applies when an agency undertakes (or authorizes another party to undertake) some project or activity that may have significant environmental impacts. See *Sierra Club* v. *Hodel*, 848 F. 2d 1068, 1090-1091 (10th Cir. 1988) (agency's decision to allow road construction on federal lands subject to NEPA); *Foundation for N. Am. Wild Sheep* v. *USDA*, 681

F.2d 1172, 1178 (9th Cir. 1982) (grant of special use permit to reopen road through sensitive habitat required preparation of EIS); *Puerto Rico Conservation Found.* v. *Larson*, 797 F. Supp. 1066, 1070-1071 (D.P.R. 1992) (federal agencies' decision to reconstruct and reopen road required EIS); *Bunch* v. *Hodel* 642 F. Supp. 363, 365 (W.D. Tenn. 1985) (federal acquiescence in State's proposed drawdown of water in lake required EIS).

The NEPA predicate of a federally undertaken, approved, or authorized project or activity is absent here. The Forest Service authorized petitioners' predecessor, Floyd Elliott, to install the gate through a special use permit that terminated, according to its express terms, when petitioners purchased the property in 1989. Neither the expiration of the Elliott special use permit nor the Forest Service's refusal to issue a new permit is federal "action" within the meaning of NEPA. Neither event involves the type of affirmative federal "action" that Congress sought to subject to environmental impact analysis. Indeed, petitioners do not cite—and we are unaware of—any judicial decision holding that an agency's refusal to issue a permit is federal "action" for purposes of NEPA.

CEQ's regulations reinforce the common sense conclusion that the Forest Service's denial of an application for a permit is not a "Federal action" for purposes of NEPA. The CEQ's regulations provide that "[a]ctions" encompass "new and continuing activities, including projects and programs entirely or partly *financed*, *assisted*, *conducted*, *regulated*, or *approved* by federal agencies." 40 C.F.R. 1508.18(a) (emphasis added). "Federal actions" typically consist of the promulgation of "official policy" through regu-

lations, "[a]doption of formal plans" and "programs," as well as the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area." 40 C.F.R. 1508.18(b). "Projects include actions *approved by permit or other regulatory decision* as well as federal and federally assisted activities." *Ibid.* (emphasis added). But a federal agency's *rejection* of a non-federal party's request for a permit, or other request for an exemption from general regulatory prohibitions, is not an "action" for purposes of NEPA.

The Forest Service's contemplated removal of the unauthorized gate (if petitioner Greg Biagi does not do so first) likewise is not subject to NEPA's environmental analysis requirements. Forest Service regulations make it unlawful to maintain any structure on National Forest System lands without a special use permit and expressly authorize the agency to remove any such structure. 36 C.F.R. 261.10(a) and (f) 261.12(d), 262.12(a), 262.13. As the court of appeals correctly noted (Pet. App. A14), the Forest Service's planned removal of the gate is simply an exercise of the agency's law enforcement authority under those provisions.

"[J]udicial or administrative civil or criminal enforcement actions" are not "actions" subject to NEPA. 40 C.F.R. 1508.18(a). A contrary rule would allow violators to use NEPA as a means of delaying and obstructing agencies' ability to enforce the law against them. Not surprisingly, few litigants have raised NEPA objections to law enforcement activities, and none has done so successfully. See *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992); *Calipatria Land Co.* v. *Lujan*, 793 F. Supp. 241, 245-246 (S.D. Cal. 1990);

*United States* v. *Rainbow Family*, 695 F. Supp. 314, 324 (E.D. Tex. 1988).

2. Petitioners further argue (Pet. 14-16) that this Court should grant certiorari to address the question whether the term "major" in Section 102(2)(A) of NEPA, 42 U.S.C. 4332((2)(A) (1994 & Supp. II 1996), operates as an independent basis on which an agency may decline to prepare an EIS. There is no reason, however, for this Court to address that question. The district court ruled that, even if the Forest Service's demand that petitioners remove the gate is an "action," it is not a "major" action. Pet. App. A9. The court of appeals, however, did not rely on that rationale, holding instead that "[n]o federal *action* occurred here to trigger the requirements of [NEPA]." Pet. App. A14 (emphasis added). Accordingly, this case presents no occasion to take up the question of statutory construction identified by petitioners.

3. Petitioners also contend that the courts of appeals are "split" concerning the standard of review for an agency's "threshold determination" as to whether NEPA applies. See Pet. 17 (alleging conflict between *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990), and, *inter alia*, *Northcoast Environmental Center* v. *Glickman*, 136 F.3d 660, 666-667 (9th Cir. 1998)). Petitioners are mistaken with respect to both the existence and the importance of the purported conflict.

This Court held in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), that an agency's decision whether to prepare a supplemental environmental impact statement in response to new environmental information is subject to judicial review under the APA's "arbitrary and capricious" standard, 5 U.S.C. 706(2)(A). See 490 U.S. at 376-377. The Court

observed that that question presents a "classic example of a factual dispute the resolution of which implicates substantial agency expertise." 490 U.S. at 376. Following the rationale of *Marsh*, the Ninth Circuit and other courts of appeals have uniformly held that other kinds of factual determinations under NEPA, such as findings that a proposed action will not have a significant impact on the environment so that no EIS need be prepared, are subject to arbitrary and capricious review. See *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992). See also, *e.g.*, *Sierra Club* v. *U.S. Forest Service*, 46 F.3d 835, 840 (8th Cir. 1995); *Sabine River Auth.* v. *U.S. Dep't of Interior*, 951 F.2d 669, 678-679 (5th Cir.), cert. denied, 506 U.S. 823 (1992); *Sierra Club* v. *Lujan*, 949 F.2d 362, 367-368 (10th Cir. 1991); *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990).

The Eighth and Ninth Circuits have concluded that *Marsh*'s rationale does not apply, however, to agency determinations on "threshold question[s] of NEPA applicability." See *Northcoast Envtl. Ctr.*, 136 F.3d at 666-667; *Goos* v. *ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990). Those courts have reasoned that such "threshold" questions are "primarily legal" in nature and therefore should be reviewed under a test of "reasonableness." See *Northcoast Envtl. Ctr.*, 136 F.3d at 666-667; *Goos*, 911 F.2d at 1292. The other courts of appeals have not addressed that distinction. For example, the Eleventh Circuit's decision in *North Buckhead*, cited by petitioners (Pet. 17), involved a challenge to the adequacy of an environmental impact statement, see 903 F.2d at 1538-1545, which presents the type of fact-intensive issue that the courts have uniformly held comes within the rationale of *Marsh*. Indeed, the Ninth Circuit has cited *North Buckhead*

with approval for the proposition that agency findings of no significant impact under NEPA are subject to "arbitrary and capricious" review. See *Greenpeace Action*, 14 F.3d at 1331. Because the Eleventh Circuit has not addressed whether the "arbitrary and capricious" standard applies to "threshold" NEPA determinations, the split of authority asserted by petitioners does not exist.

The issue also does not appear to have much practical importance. As this Court observed in *Marsh*, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." 490 U.S. at 377 n.23. See also *Sabine River Auth.*, 951 F.2d at 678 n.2. Neither the district court nor the court of appeals discussed the issue, and the choice of the standard of review would not have altered the outcome in this case. The Ninth Circuit regards its "reasonableness" standard of review for "threshold" determinations of NEPA applicability as "less deferential" than the arbitrary or capricious standard, see *Northcoast Entl. Ctr.*, 136 F.3d at 667. The court of appeals presumably applied that less deferential standard here and nevertheless upheld the Forest Service's view that NEPA was inapplicable.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(3)

NO. 97-1938

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1997 TERM

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GREG D. BIAGI and LISA BIAGI,

Petitioners,

v.

UNITED STATES FOREST SERVICE,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### A. The Question of Whether the Substance or Form of Federal Agency Action Governs NEPA's Applicability is Squarely Presented

Respondent's Brief in Opposition presents the argument that NEPA does not apply to the reopening of the Welch Creek Road because "[n]either the expiration of the Elliott special use permit nor the Forest Service's refusal to issue a new permit is federal 'action' within the meaning of NEPA." Respondent's Opposition, at 8. Thus, the Forest Service continues to argue that NEPA does not apply to the decision to reopen the Welch Creek Road because the reopening is solely a function of the agency's "refusal to issue a permit." *Id.*

In considering this issue, the Court should be aware that the record in this case does include an explicit written statement by the Forest Service, issued after the Biagis applied for the seemingly routine transfer of the Elliott special use permit, which indicates that the Forest Service approved the continuing "closed" status of the Welch Creek Road.[1] This written statement was issued on September 17, 1990. More than five years later, the Forest Service without complying with NEPA made a decision to reopen the Welch Creek Road.

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[1]Pursuant to Supreme Court Rule 14.1(h)(vi), the full text of this written statement, which appears in the record as ER Tab 33, pp. 58-59, is included as petitioner's Appendix C following this brief.

Thus, the issue which is squarely before the Court in this case is whether or not NEPA's requirements depend on the form of the Forest Service's decision (which the Forest Service characterizes as the "denial" of the application for transfer of the Elliott permit) or whether NEPA's application instead flows from the actual effect of the Forest Service's decision, which is to reopen a road closed for environmental reasons for the past fifteen years.

Another issue presented by the Opposition is whether or not it matters that the gate which closes the Welch Creek Road is "private" or "public" property as a matter of property law. The Forest Service argues that because the gate itself is technically "private" property,[2] its continued presence is a law violation which the Forest Service can remedy without implicating NEPA. Respondent's Opposition, at 9-10. In petitioners' view, this argument entirely begs the question. Regardless of whether the ownership of the gate is "private" or "public," the issue presented is whether or not NEPA must be followed before a decision to remove the gate is made by the Forest Service, a federal agency.

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[2]For reasons of economy, the Forest Service in 1981 required the landowner who wished to use the Welch Creek Road to install and maintain the gate closing that road. Thus, although required as a condition of the permit to use the road the gate itself appears to be technically "private" property.

## B. The Question of Whether or Not the Applicability of NEPA Requires Federal Action Which Is In Some Sense Major in Addition to Having Potentially Significant Environmental Effects Is Also Squarely Presented

Respondent is incorrect in arguing, Respondent's Brief, at 10, that this case presents no occasion to take up the question of whether or not NEPA's applicability requires federal action which is in some sense "major" in scope. As demonstrated by the decision of the District Court in this case, the issue is indeed squarely presented.

Respondent's Opposition does not in any way dispute the detailed evidence petitioners placed before the District Court, most notably the Forest Service's own published Watershed Analysis, which shows that the reopening of the Welch Creek Road threatens adverse environmental consequences which are very significant.

The District Court in this case rejected respondent's argument that the couching of the Welch Creek Road reopening as the "denial" of a permit precludes review under NEPA. Therefore, the District Court reached the further issue of whether or not the substance of the decision, which is to reopen the one-mile Welch Creek Road segment that has been closed for fifteen years, triggers NEPA. The District Court granted summary judgment in favor of respondent exclusively on the holding that this action, even though potentially significant in terms of its environmental effects, was not large enough in scope to qualify as "major federal action" within the meaning of the governing statute, 42 U.S.C. § 4332. Petition for Writ of Certiorari, App. A,

pp. 10-11.

However, the District Court was uncertain enough about its resolution of this issue that it granted a stay pending appeal of the reopening of the Welch Creek Road, which continues in effect at this time. ER Tabs 51, 52. The stay was based on the District Court's explicit conclusion that a serious question is presented "particularly on the importance of whether or not it's a major federal action." ER Tab 51, at 9. This points up the need for clarification from this Court regarding the proper interpretation of NEPA in this regard.

## CONCLUSION

The Court should grant petitioners' petition for a writ of certiorari.

Dated: August 11, 1998.

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**APPENDIX C: LETTER FROM GILBERT H. EASTER, JR., DISTRICT RANGER, TO GREG D. BIAGI DATED SEPTEMBER 17, 1990 [ER TAB 33, pp. 58-59]**

Reply to: 7700

Date: Sept. 17, 1990

Greg D. Biagi
676 Scotland Court
Santa Rosa, CA 95409

Dear Greg:

This letter acknowledges receipt of your application for a road use permit on a portion of road 20N01E which accesses your Faraway Ranch property. I have also received an application from Jack Stout who has an easement across your property. Both applications appear to be complete. I am expecting permits to be issued to both applicants. The permits will require the permittees to work together to perform neccessary road maintenance to prevent resource damage. Because the road is very close to Soda Creek timely road maintenance is very important. Prior to the decision on issuance of the road use permits, this letter will serve as authorization to maintain the gate and use the road behind the gate. Jack Stout will be receiving a letter similar to this one and will have the same rights to maintain the gate and use the road.

There may be some misunderstanding of permittee rights and the Forest Service role in Road Use Permits. Road Use Permits are issued to:

(1) permit commercial hauling on a Forest Service road
(2) allow use on a Forest Service road not open to Public use.

Approximately 25% of the Upper Lake District road system is in nonuse status (road maintenance Level I) and barriered or gated to prevent public use. Road maintenance needs on the nonuse roads is reduced and there is significant cost savings. The Forest Service may allow property owners to use Level I roads and still prohibit public use. This is accomplished by issuing a Road Use Permit [situation (2) above] which requires the land owner to perform the added road maintenance generated by the landowner's use. As I have already discussed, when there are two or more land owners the Forest Service issues permits to each land owner and requires them to work together. Occasionally this procedure does not work and the landowners cannot/will not work together and resource damage occurs. When that situation occurs, the Forest Service can require a performance bond to repair the damage. In addition the Forest Service can revolk the road use permits for nonperformance. The road then may be closed to all use or opened to public use with the Forest Service performing the maintenance.

If there are any questions during the processing of your application, I will call you. If you have any questions, feel free to call me during business hours at (707) 275-2361.

Sincerely,

GILBERT H. EASTER, Jr.
District Ranger